

**BEFORE THE STRUCTURAL PEST CONTROL
DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Plumas
(County File No. SCP-PLU-2005/06-001)

Docket No. S-011

DECISION

**Dean Brand Construction
P.O. Box 116
Taylorsville, California 95983**

Appellant/

Procedural Background

Pursuant to section 8617 of the Business and Professions Code (BPC), the Plumas County Agricultural Commissioner (CAC or "commissioner") may levy a civil penalty up to \$5,000 for each "serious" violation of certain State structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Plumas County CAC found that Dean Brand Construction (appellant) violated section 8550(a) of the BPC by applying a pesticide for hire in the attic of a house without a license from the Structural Pest Control Board. The commissioner imposed a penalty of \$200.00 for that violation.

The appellant appealed from the commissioner's civil penalty decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of the appeal; and is authorized to sustain, modify by reducing the amount of the fine levied, or reverse the commissioner's decision. (Bus. & Prof. Code, § 8662(b)(7).) Members serving on the Disciplinary Review Committee were Peter Giammarinaro for the structural pest control industry, Kelli Okuma for the Structural Pest Control Board (SPCB), and Eric Walts for the Department of Pesticide Regulation. The Committee heard oral argument via telephonic conference on May 18, 2006. The appellant was represented by Mr. Dean Brand. The commissioner was represented by Mr. Karl Bishop.

Standard of Review

The Committee decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Committee looks to see if there was substantial evidence in the record, contradicted or uncontradicted, before the Hearing Officer to support the commissioner's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant evidence, and inferences from that evidence, to support a conclusion even though other conclusions might also have been reached. The Committee draws all reasonable inferences from the information in the record to support the findings and reviews the record in the light most favorable to the commissioner's decision. If the Committee finds substantial evidence in the record to support the commissioner's decision, the Committee affirms the commissioner's decision.

If a commissioner's decision presents an issue of the interpretation of a law or regulation, the Committee decides that matter using its independent judgment.

Appellant's Contentions

On appeal, Dean Brand Construction contends that Hearing Officer may have been biased and prejudiced because the Lassen County and Sierra-Plumas County CACs have a practice of trading hearing officer services. The Hearing Officer, Kenneth R. Smith, is the County Agricultural Commissioner of Lassen County. Although not specifically raised on appeal, appellant contended at hearing and oral argument that the fine was excessive.

Analysis

- The commissioner's use of Kenneth R. Smith as a hearing officer was proper.

As an initial matter, the Committee deems this claim waived.¹ When the Committee asked Mr. Brand at oral argument, why appellant did not to raise the issue of hearing officer bias at the hearing, he replied that they thought "it was unnecessary". Given this fact, appellant cannot raise this use for the first time on appeal. There is no evidence in the record on this issue for the Committee to review, and the commissioner did not have had the opportunity to consider, examine, or address any such evidence. The conclusion can be drawn that the appellant was not concerned with the hearing officer's neutrality or bias, until the hearing officer decided against it.

Nevertheless, the Committee chooses to address the merits of appellant's contention by accepting appellant's unproven allegations as fact, because it can be decided as a matter of law. The appellant has a right to a neutral and unbiased decision-maker in an administrative adjudication concerning the levying of a fine. A neutral decision-maker is fundamental to the due process of law. However, the mere possibility, or unsubstantiated insinuation, of bias will not overcome the presumption that Mr. Smith discharged his public duty with integrity; that he was in fact a neutral hearing officer.² To prevail, appellant must produce concrete facts that demonstrate actual bias or an unacceptable probability of bias. The appearance of bias is not sufficient.³

¹ Appellant was represented at the hearing by an attorney.

² *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir.1995).

³ *Andrews v. Agricultural Labor Relations Bd.*, (1981) 28 Cal.3d 781, 792-793, 171 Cal.Rptr. 590. See *Breakzone Billiards v. City of Torrance*, 97 Cal.Rptr.2d 467 (2d Dist. 2000). See also *U.S. v. State of Oregon*, 44 F.3d 758, 772 (9th Cir.1994).

The only allegation that appellant makes to support his accusation of bias, is that the Lassen County and Sierra-Plumas County CACs have a practice of trading hearing officer services. Assuming that allegation is true, such relationship would not show actual bias or an unacceptable probability of bias in this case. As an example, it would offend due process for the official who advocates for the agency in a case to also advise the decision-maker in that same case.⁴ However, one employee of an agency may act as the decision-maker while another separately prosecutes the case.⁵ The commissioner himself or a designated, regular employee could have conducted the hearing, without thereby offending the requirements of due process in administrative adjudications established by federal and state courts. There is a greater possibility of bias, or improper influence, where the hearing officer is an employee of the agency prosecuting the case, than the practice of which the appellant complains. Two separate agencies regularly exchanging hearing officer services does not itself create an unacceptable probability of bias. In fact, it is more protective of the appellant's right to a neutral hearing officer than the minimum process due to appellant in administrative adjudications under the federal and state constitutions.

The procedures employed by the commissioner did not violate appellant's due process right to a neutral hearing officer.

- Substantial evidence supports the Hearing Officer's finding that appellant violated section 8550(a) of the BPC.

It is unlawful for any individual to engage in, or propose to engage in, the business or practice of structural pest control unless he or she is licensed pursuant to Chapter 14 of Division 3 of the BPC. (Bus. & Prof. Code, § 8550(a)). Among other activities, the business or practice of structural pest control includes engaging in (or offering, advertising or soliciting to engage in) the use insecticides, pesticides, rodenticides, fumigants, or allied chemicals or substances, or mechanical devices for the purpose of eliminating, exterminating, controlling or preventing infestations or infections of household pests or wood destroying pests or organisms. (Bus. & Prof. Code, § 8505).⁶

There is substantial evidence in the record that appellant engaged in the business of structural pest control. Bid proposals, signed by Dean Brand and Wilma Taddei, propose to "Complete Items 1A-1B-1D-7A-11B of Lassen Pest Control Report #6534" at "221 Kinder" for payment. (Hearing Exhibit A-11.) "Item 1B" of that report calls for applying Copper Naphthenate to form board to inhibit infection; "Item 7A" calls for such an application on the substructure framing. (Hearing Exhibit A-12).

⁴ See *Nightlife Partners v. City of Beverly Hills*, 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234 (2d Dist. 2003).

⁵ *Withrow v. Larkin*, 421 U.S. 35 (1975); *Dept of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 121 Cal.Rptr.2d 729 (4th Dist. 2002).

⁶ As noted at the hearing, a person who uses pesticides to control structural pests on his or her own property does not require a license to do so. (Bus. & Prof. Code, § 8555). However, such a person is subject to other requirements, notably, to only use that pesticide consistently with the label. (See Food & Agr. Code, § 12973. See also Bus. & Prof. Code, §§ 8551, 8552.)

There is substantial evidence that appellant was not licensed to engage in structural pest control. Neither Mr. Dean Brand nor Dean Brand Construction appears on the list of persons in Plumas County that hold a license from the Structural Pest Control Board, Department of Consumer Affairs. (Hearing Exhibit A-16.) Finally, in its "Response to Notice of Proposed Action", appellant admits to "applying the product Jasco Termin-8 to the rafter members in the attic crawl space without a license to do so . . ." (Hearing Exhibit R-1).⁷

Thus substantial evidence supports the conclusion that appellant violated section 8550(a) of the BPC.

Appropriateness of the Fine

Section 1922 of Title 16 of the California Code of Regulations defines moderate violations in part as "violations which pose a reasonable possibility of creating a health or environmental effect." (Cal. Code Regs., tit. 16, § 1922(a)(1)(B).) The commissioner does not have the burden to show that an actual effect occurred. The fine range for "moderate" violations is \$151-400. (Cal. Code Regs., tit. 16, § 1922(a)(1)(B).)

The commissioner fined the appellant \$200 for one count of violating section 8550(a) of the BPC. Copper Naphthenate is a substance that can have health and environmental effect, as amply discussed on the product label. (See Hearing Exhibit A-13.) Appellant applied that substance to the inside of a residence. (Hearing Exhibits A-1-7, 10-12 & R-1). If appellant had complied with section 8550(a), it would not have made the application at all. Thus, substantial evidence to supports the commissioner's decision that this violation posed a reasonable possibility of creating a health effect.

Pesticides can have serious environmental and health effects if not properly applied, which is why their sale and use is closely regulated. SPCB's licensing of structural pest control operations serves to protect against that risk. Unlicensed practice of structural pest control involving application of a pesticide is at least a "moderate" violation as a matter of law. No reduction of the fine is appropriate.

Conclusion

The record shows the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The Plumas County CAC's decision is affirmed. The commissioner's order is stayed until 30 days after the date of this decision to provide opportunity for the appellant to seek judicial review of the Committee's decision as set forth below.

⁷ Hearing Exhibit R-1 is a hearsay statement offered by appellant, even though Mr. Brand was present at the hearing and able to testify to the underlying facts. However, the Committee notes that this statement against appellant's interests was made in Mr. Brand's presence without his objection and is corroborated by other evidence.

Dean Brand Construction
Docket No. S-011
Page 5

The \$200 civil penalty levied by the commissioner against the appellant for its violations of section 8550(a) of the Business and Professions Code is due and payable to the "Structural Pest Control Education and Enforcement Fund" 30 days after the date of this decision. The appellant is to mail the payment along with a copy of this decision to:

Structural Pest Control Board
1418 Howe Avenue, Suite 18
Sacramento, California 95825

Judicial Review

BPC § 8662 provides the appellant may seek court review of the Committee's decision pursuant to Code of Civil Procedure § 1094.5.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: June 9, 2006

By: 

Eric Walts, Member

for and with the concurrence of all members
of the Disciplinary Review Committee